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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO INTERIANO-RIVAS, Defendant and Appellant.	G055658 (Super. Ct. No. 15WF1607) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White and Mary Katherine Strickland, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted 48-year-old defendant Ricardo Interiano-Rivas of having sexual intercourse with his four-year-old niece Jane Doe (count one), and committing two other lewd and lascivious acts upon her (counts two and three).[1] Defendant contends there was insufficient evidence to support the "penetration" element in count one, and insufficient evidence to support the "touching" element in counts two and three.

We disagree and affirm the judgment.

I

FACTS AND PROCEDURAL BACKGROUND

Fifteen-year-old Mary Doe lived in a two-bedroom apartment in Costa Mesa with her family. Mary's mother and father shared their master bedroom with Mary's younger sister Jane, who had a separate bed. Mary shared her bedroom with her brother. Defendant, the children's uncle, slept on the sofa in the living room.

On July 20, 2015, at about 11:30 a.m., Jane was sitting on the sofa eating bread and watching a tablet. The door to the master bedroom was open. There was music playing on the radio at a very low volume. Mary walked downstairs to the laundry room, leaving defendant alone with Jane. After a couple of minutes, Mary called defendant; she was expecting him to help her with the laundry. Defendant did not answer the phone, so Mary walked back upstairs.

When Mary returned to the apartment the music was now very loud. Mary did not see Jane or defendant in the living room; the bread and the tablet were lying on the floor. Mary checked the second bedroom, the bathroom, and the kitchen, but she did not see Jane or defendant. Mary opened the now closed door to the master bedroom.

When Mary opened the door she saw defendant and Jane lying on top of her parent's bed. Jane's underwear and pajamas were down to her knees. Jane's "right

[1] We are using fictitious names for the children involved in this case for anonymity purposes.

leg was like leaning and the left one was underneath like maybe like forming a figure four." Jane's eyes were "shut very, very tight." Defendant's "underwear was all the way down to the knees." Defendant was on top of Jane, with his "left arm he was like bracing his body weight." Mary could see defendant's erect penis in his right hand, defendant was rubbing the tip of his penis from side to side on the lips of Jane's vagina.

Defendant reacted by immediately laying down on his stomach and zipping up his pants. Defendant told Mary she had not seen "what I had seen and to keep quiet." Mary grabbed Jane, took her out of the bedroom, and called 911; defendant tried to grab the phone away from Mary.

Court Proceedings

The prosecution charged defendant with one count of sexual intercourse with a child 10 years of age and younger (count one), and two counts of committing a lewd act on a child under the age of 14 (counts two and three). (Pen. Code, §§ 288.7, subd. (b), 288, subd. (a).)[2]

After the close of evidence at trial, the court instructed the jury as to count one: "Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis." As to counts two and three, the court instructed the jurors that they needed to unanimously agree as to which lewd act defendant committed. The prosecutor alleged that defendant's lewd act in count two was the nonpenetrative touching of Jane's body with his penis. The prosecutor alleged that defendant's lewd act in count three was the touching of Jane's body with his hand.

The jury returned guilty verdicts on all three counts. The court sentenced defendant to an indeterminate prison term of 25 years to life as to count one, and concurrent six-year terms as to counts two and three.

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[2] Further undesignated statutory references will be to the Penal Code.

II

DISCUSSION

Defendant contends there was insufficient evidence that he penetrated Jane's genitalia with his penis (count one). Defendant also contends there was insufficient evidence that he additionally touched any other part of Jane's body with his penis (count two) or with his hands (count three).

We apply a deferential standard of review: "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"'[W]e "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) "The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.)

A. Count One – Sexual Intercourse with a Child 10 Years Old or Younger

"Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished . . . for a term of 25 years to life." (§ 288.7, subd. (a).) "Sexual intercourse

means *any penetration*, no matter how slight, of the vagina or genitalia by the penis." (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 79, italics added.)

Any contact by the penis between the folds of skin over the vagina constitutes penetration. (See *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 ["The external female genitalia are referred to as the 'vulva' and "'include[] the labia majora, labia minora, clitoris and vestibule of the vagina'"'].) "The vagina is only one part of the female genitalia, which also include . . . the labia majora, labia minora, and the clitoris." (*Id*. at p. 1367.) Each penetration constitutes a separate act. (See *People v. Brown* (1994) 28 Cal.App.4th 591, 601 [in course of single incident trial court properly imposed consecutive sentences for eight counts of rape].)

Mary testified that she saw defendant rubbing his penis from side to side on the lips of Jane's vagina. Further, a sexual assault nurse testified that she examined Jane about six hours after the assault. The nurse said that she took swabs from Jane's vulva, vestibule, and internal vagina. A forensic scientist testified that she conducted testing on the swabs and found a DNA match of defendant to semen, which was found on Jane's external genitalia. Moreover, the prosecution introduced evidence of other male genetic material (not semen), which was found on a swab of Jane's vestibule (defendant could not be excluded as a donor of that genetic material). Additionally, police collected a swab from defendant's penis, which revealed the presence of foreign DNA (the amount was too low to identify the person).

Given the eyewitness testimony and the circumstantial forensic evidence, the jury could have reasonably deduced that defendant's penis penetrated Jane's genitalia. Thus, we find substantial evidence to support defendant's conviction in count one for sexual intercourse with a minor 10 years of age or younger.

Defendant argues that evidence of penetration is insufficient due to the "vagaries of the evidence." (Capitalization omitted.) Defendant notes that the sexual assault nurse labeled one of the swabs "vulva" instead of "labia majora." Defendant also

notes that the nurse did not observe any injuries due to penetration.[3] But it is not our role to make credibility determinations or to reweigh the evidence. In a substantial evidence review our role is narrow. (See *People v. Nelson* (2011) 51 Cal.4th 198, 210 ["'We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence'"].) Having found substantial evidence to support the jury's deduction of the facts, we affirm the jury's verdict.

B. Counts Two and Three – Lewd or Lascivious Acts with a Child Under the Age of 14

Generally, "a person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person . . . is guilty of a felony . . . ." (§ 288, subd. (a).) The crime has two elements: (1) the touching of an underage child's body (2) with a sexual intent. (*People v. Martinez* (1995) 11 Cal.4th 434, 444-445.)

"The touching of a minor's genitals may be an offense under section 288, which makes 'any touching' of an underage child accomplished with the requisite intent a crime." (*People v. Terry* (2005) 127 Cal.App.4th 750, 772.) However, the statute "does not require the touching involved be that of a sexual organ. [Citation.] The crux of such crime is that the perpetrator have the specific intent to arouse sexual desire when *any touching of any part of the body* of an underage child is committed." (*People v. Chambless* (1999) 74 Cal.App.4th 773, 785, italics added.)

A conviction for lewd conduct upon child under the age of 14 does not require the touching to be overtly sexual. Further, the touching may be done by the victim at the instigation of the defendant, "providing it was done for the purpose of some immediate sexual gratification." (*People v. Austin* (1980) 111 Cal.App.3d 110, 113.)

[3] The nurse testified that she typically only sees penetration injuries in about 10 percent of children due, in part, to the protective anatomy of a child's genitalia.

In *Austin*, the defendant directed an eight-year-old girl to take down her pants. (*Id*. at p. 112.) The defendant never touched the girl, but the court held that he could be prosecuted: "The touching necessary to violate . . . section 288 may be done by the child victim on [her] own person providing such touching was at the instigation of a person who had the required specific intent." (*Id*. at p. 114, capitalization omitted.) Since the child touched herself when she took down her pants at the defendant's direction, the "touching" requirement had been met. The defendant "was responsible for the touching and removal of the child's pants as surely if he had done it himself." (*Id*. at p. 115.)

1. Evidence of Nonpenetrative Penile Touching (*Count Two*)

On direct examination, Mary testified that she saw defendant rub his penis from side to side on the lips of Jane's vagina. On redirect, the prosecutor asked Mary: "When you say he was rubbing it from side to side, his penis on the lips of [Jane's] vagina, do you know if was going from the left side to the right side and then the right side to the left side?" Mary responded: "Well yes. When I saw it, you know, that is what he was going from right to left. And then when I saw that, that is when he went and put it above the vagina area." On recross-examination, the defense attorney asked: "*So now you are saying you saw two movements*. You saw him go side to side and touch her vagina side to side, and then go up top and touch her vagina again? Is that what you are saying now?" (Italics added.) Mary responded: "Yes."

Based on Mary's testimony, the jury could have reasonably deduced that defendant touched Jane's body two separate times with his erect penis. The first touch being penetrative in nature; that is, the rubbing of Jane's external genitalia. The second touch being "above the vagina area." Of course, any contact by defendant with his erect penis against any part of Jane's body would support an inference that the touching was done for a sexual purpose. (See *People v. Terry, supra,* 127 Cal.App.4th at p. 772.)

Thus, we find substantial evidence to support defendant's conviction in count two for committing a lewd act on a child under 14 years of age.

Defendant argues that Mary "offered inconsistent accounts of much of the events, much of which did not cohere." But again, we leave those types of credibility determinations to the jury.

2. *Evidence of Touching with Defendant's Hands* (*Count Three*)

Mary testified that when she returned to the apartment the music had been turned up. Mary said that when she first saw Jane on the bed with defendant, Jane's pajama bottoms and underwear had been pulled down, her legs were spread open, she had one hand behind her back, and her eyes were tightly closed. A crime scene investigator testified that after defendant's arrest, he observed possible injuries on defendant: "There was redness and possible [sic] similar to scratch marks on the front of the left shoulder. There was a small abrasion of redness on the left forearm, and on the inside near the elbow on the left arm there was redness and a possible scratch."

Based on the evidence, the jury could have reasonably deduced that defendant touched Jane by physically moving her to the master bedroom and positioning her on the bed. The jury could have also reasonably deduced that defendant touched Jane when he lowered her clothing, or Jane touched herself when she lowered her clothing; in either case, there is compelling evidence that Jane's clothing was lowered for the purpose of defendant's immediate sexual gratification. (See *People v. Austin*, *supra*, 111 Cal.App.3d at p. 115 [defendant "responsible for the touching and removal of the child's pants as surely as if he had done it himself"].) And again, the court instructed the jurors that they had to unanimously agree as to which "touching" act defendant committed; we presume that the jurors followed the court's instructions. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Thus, we find substantial evidence to support defendant's conviction in count three for committing a lewd act on a child under 14 years of age.

Defendant argues that some of the "touching" evidence was not discussed by the prosecutor "in either opening or closing arguments." But defendant has cited no authority that limits our review solely to only the evidence that was argued by the prosecutor. In a substantial evidence review, we generally consider all of the substantive evidence admitted during the trial.[4]

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.

[4] In this case, we also directed the trial court to transmit to this court all of the admitted demonstrative exhibits (12 photographs and one diagram), which were referenced by the witnesses and the attorneys during the trial. (See Cal. Rules of Court, rule 8.224(d) ["At any time the reviewing court may direct the superior court . . . to send it an exhibit"]; see also *People v. Duenas* (2012) 55 Cal.4th 1, 25 [demonstrative evidence is evidence that is shown to the jury "as a tool to aid the jury in understanding the substantive evidence"].)